U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 16 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a software quality engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), which was certified by the Department of Labor (DOL).

The director determined that the Form ETA 750 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director denied the petition accordingly.

On appeal, counsel argues that the petitioner sought classification as an advanced degree professional based on the amended Form ETA 750 which clearly requires a master's degree in computer science, mechanical or electrical engineering or related field or a bachelor's degree in the required field and five years progressive experience in software development.

The record shows that the appeal is properly and timely filed.[1] The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

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[1] The AAO notes that the petitioner filed another I-140 immigration petition ([redacted]) on behalf of the instant beneficiary with the service center on July 18, 2008 while the instant appeal was pending with the AAO. The new petition is currently pending with Nebraska Service Center.

Here, the Form I-140 was filed on July 19, 2007. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

In this case, the Form ETA 750 was initially filed with DOL on July 24, 2003. The record contains a copy of the amended page 1 of the Form ETA 750A with the petitioner/employer's initial verifying amended items. The amended Form ETA 750A shows that the petitioner amended eight items on January 19, 2007. As of the portion of the job offer, the petitioner changed the college requirement from "B.S." to "MS", the college degree required from "Bachelor of Science" to "Master of Science" and added the following note to the degree requirement in Item 15: "Will consider candidates with B.S. in Computer Science, Mechanical or Electrical Engineering, or related field and five (5) years progressive experience in software development. Foreign degree equivalent accepted." The petitioner also amended the five years of experience requirement with three years. The Form ETA 750 was certified on May 3, 2007. The original certified coy of Form ETA 750 shows that on April 30, 2007, the DOL regional office converted the petitioner's amendments to the initially filed Form ETA 750, including Item 2 alien address, Item 5 employer telephone, Item 6 employer address, Item 12 rate of pay, Item 14 experience requirement on Form ETA 750A and Item 2 alien address and Item 8 employer address on the Form ETA 750B. However, the regional office did not convert the petitioner's amendments on the college requirement and college degree requirement in Item 14. For the note the petitioner added for the master of science degree, the officer wrote "see amendment" in Item 15 instead of converting the whole note onto the original Form ETA 750A. The record does not contain any documentary evidence showing that the Form ETA 750 was further amended, changed or corrected before it was certified on May 3, 2007.

On appeal, counsel argues that the handwritten "see amendment" by the regional office in Item 15 should be correctly interpreted as that the all amendments the petitioner made on the new Form ETA 750A be accepted and approved by the DOL regional office and thus be part of the certified Form ETA 750. However, counsel's assertion is not persuasive. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). The DOL regional office certifies a labor certification on the terms and conditions clearly set forth,

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

corrected and approved by the regional office and it is the common practice that the regional office converts all approved correction and/amendments onto the original Form ETA 750 and stamps its approval as "correction approved by regional office" with the approved officer's initials and dates. In the instant case, the regional office did not stamp on the amendments of college requirement and college degree requirement. The statement in Item 15 "see amendment" cannot be interpreted to mean that all the amendments including the amendments on college and college degree requirements had been accepted and approved by the DOL as part of certified labor certification. In addition, the alternate education requirement was set forth by the petitioner as an interpreting note to the master degree requirement. Since the amendment on the degree requirement was not accepted and approved by the regional office, the alternate education requirement, i.e. bachelor's degree plus five years of experience in lieu of a master degree, could not be part of the certified terms or conditions of the Form ETA 750.

On appeal, counsel also asserts that the DOL officer erred in not altering the master degree requirement. However, the record does not contain any documentary evidence to support counsel's assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, if the petitioner had wanted a master's degree or a bachelor's degree plus five years of experience to be required for the proffered position, it should have requested that DOL correct it when the Form ETA 750 was certified in 2007.

Accordingly, the underlying Form ETA 750 was certified on the terms that the requirements of the proffered position may be met with bachelor's degree in computer science, mechanical or electrical engineering or related field plus three years of experience in the job offered or in the related occupation of software development, and thus, the job offer portion of the Form ETA 750 does not require a master's degree or a bachelor's degree plus five years of progressive experience in the specialty as minimum requirements for the proffered position. Therefore, the petition cannot be approved for the requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability. In this matter, the appropriate remedy would be to file another petition for classification as a skilled worker pursuant to section 203(b)(3)(i) of the Act.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

> accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). Here, the From ETA 750 was accepted on July 24, 2003. The proffered wage as stated on the Form ETA 750 is $74,838 per year. The petitioner claimed to be established in 1987, to have approximately 50 employees and a gross annual income of $1,600,000 on the petition.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), USCIS will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not submit any documentary evidence showing that the petitioner paid the beneficiary compensations in any relevant years although it claimed that the beneficiary worked for the petitioner since November 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's

assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The record contains the petitioner's audited financial statements for 2004 and 2005. These documents show that the petitioner had net income of ($3,697,122) in 2004 and $77,187 in 2005, net current assets of ($12,562,571) in 2004 and ($11,614,702) in 2005. While the petitioner had sufficient net income in 2005 to pay the instant beneficiary the proffered wage, it did not have sufficient net income or net current assets to pay the proffered wage in 2004, and thus, it failed to establish its ability to pay the proffered wage for 2004.

The record does not contain any regulatory-prescribed evidence for the petitioner to establish its ability to pay the proffered wage in 2003, and 2006 through the present. Therefore, the petitioner failed to establish its continuing ability to pay the proffered wage for these years because it failed to submit regulatory-prescribed evidence for these years.

In addition, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries, which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions. Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. In the instant case, USCIS records indicate that the petitioner filed I-140 immigration petitions for some other beneficiaries: two of them are pending with the service center in addition to the instant petition, and at least one of them had been approved for which the petitioner was obligation to pay additional proffered wage for

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

2003 through 2008.[4] The record does not contain any evidence showing that the petitioner paid this beneficiary of the approved immigrant petition the full proffered wages for 2003 through 2008. As previously discussed, although the petitioner's audited financial statements for 2005 indicate that the petitioner had sufficient net income to pay the instant beneficiary the proffered wage, its net income of $77,187 for 2005 was not sufficient to pay another proffered wage for which the petitioner was also obligated to pay that year. Therefore, the petitioner failed to demonstrate that it had sufficient net income or net current assets to pay all proffered wages for I-140 petitions it filed in the relevant years.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay all proffered wages during the year of the priority date and subsequent years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

[4] USCIS records show that the petitioner has two immigrant petitions currently pending with the Nebraska Service Center: [redacted] filed on July 18, 2008 on behalf of the instant beneficiary and [redacted] filed on June 27, 2008; and at least one approved immigrant petition [redacted] which was filed on November 1, 2006 with the priority date of May 28, 2003, approved on November 30, 2006 and the beneficiary was adjusted to lawful permanent resident on June 6, 2008.